Office Supreme Court, U.S.
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JOHN T. FEY, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. ~~1049~~ 156

CONSTANCE A. STOPPER,
Petitioner,
v.
THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,
Respondent.

ADDENDUM TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

In respondent's brief in opposition to petition for certiorari it is stated that petitioner failed to raise any question of the alleged violation of her right to jury trial under the Seventh Amendment even in her petition for rehearing in the court below (Respondent's Brief, pp. 6, 7). This is not entirely accurate.

After the printed petition for rehearing was served upon respondent, counsel for petitioner by letter to counsel for respondent advised that the following paragraph, which did not appear in the printed petition, would be added to the petition filed with the court below:

> "16. The entry of judgment for defendant violates the Seventh Amendment of the United States Constitution."

Respondent thereafter informed the court clerk that it would file no answer to the petition, since the added paragraph, though belatedly raising a new issue, presented no

question of sufficient significance to require an answer. The court below then dismissed the petition without opinion.

Thus, although the alleged constitutional question was presented to the court below as a written addendum to the printed petition for rehearing, it was not decided by the court and comes too late for review by this court. *Radio Station WOW, Inc. v. Johnson,* 326 U. S. 120, 128 (1945); *American Surety Co. v. Baldwin,* 287 U. S. 156 (1932); *Wall v. Chesapeake & Ohio Ry.,* 256 U. S. 125 (1921); *Godchaux Co. v. Estopinal,* 251 U.S. 179 (1919).

Where a constitutional question which could have been anticipated is raised in the court below for the first time in a petition for rehearing, it will not be considered here. *Herndon v. Georgia,* 295 U. S. 441 (1935). In that case this court refused to consider the constitutional argument raised first in a petition for rehearing in the Supreme Court of Georgia since no federal question was seasonably raised in the court below. This court found that the statute in question had in an earlier case been construed in substance in the same manner, and that the defendant "was therefore bound to anticipate the probability of a similar ruling in his own case." *Id.* pp. 445-446.

So, here, the decision of the court below was based on numerous Pennsylvania authorities, all of which were cited to the trial court and the court below, holding that judgment notwithstanding the verdict may be entered where the uncontradicted documentary evidence shows that the insured's statements in his application were false and that he either knew they were false or otherwise acted in bad faith in making them. Petitioner was bound to anticipate the entry of judgment against her by the Court of Appeals on the basis of a similar application of this well established rule to the evidence in this case. If the entry of judgment notwithstanding the verdict raised a constitutional question concerning her right to trial by jury under the Seventh Amendment, she was bound to make this argument at the first instance in the court below, and, indeed, to raise it as a

bar in the trial court. Since the alleged constitutional question was raised for the first time in the petition for reargument and not decided by the court below, it comes too late for review here.

For this and the other reasons set forth in respondent's brief, the petition for certiorari should be dismissed.

Respectfully submitted,

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